



# Incidental Discharges a Grey Area in CWA Liability

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# Defining Incidental Discharges

- Direct Discharges of Material to Water
  - Substance falls from conveyor or dock into navigable water
  - Intentional or accidental
    - Cleaning processes sweep material into water
    - Strong wind blows material into water



# Indirect Incidental Discharges



- Commodity settles on ground where it is capable of being washed or blown into navigable waters
- More like traditional stormwater discharge

# The First Claim – Permit Violations

- 2020 ISGP S5.E.2 – Illicit discharges are not authorized by this permit.
  - Illicit Discharge means “any discharge that is not composed entirely of stormwater except” those allowed by NPDES permit or this permit. Appx. 2
  - Discharge means “any addition of any pollutant [] to surface waters of the State of Washington from any point source.” Appx. 2
  - Pollutant is defined the same as federal scheme
- 2020 ISGP G1 – Any discharge of any pollutant more frequently than, or at a level in excess of that identified and authorized by the general permit, shall constitute a violation of the terms and conditions of this permit

# The Second Claim – Statutory Violations

- 33 U.S.C. § 1311(a) – “Except in compliance with [Clean Water Act Provisions], the discharge of any pollutant by any person shall be unlawful.”
- 33 U.S.C. § 1362
  - Discharge of any pollutant means “any addition of any pollutant to navigable waters from any point source”
  - Pollutant means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water

# Differences with “Traditional” CWA Claims

- Largely, if not entirely, independent from stormwater systems
  - Not dependent on rain events
  - Does not travel through treatment systems
- Bypasses monitoring points
- Discharged materials are not likely to be covered by NPDES or ISGP
  - Materials are not usual stormwater substances

# Cases of Note

## *Louis Dreyfus 2016*

- Discharges at issue:
  - Corn intentionally swept from dock as part of routine cleaning
  - Corn likely to have unintentionally spilled from dock into water
- Courts Holding:
  - Grain intentionally swept from dock into Elliot Bay is a basis for CWA liability
  - Grants summary judgement for grain spilled on the dock
    - “It would be rather farfetched to find that none of this grain spilled into Elliott Bay.”

# Cases of Note

## *BNSF Railway 2016*

- Discharges at issue:
  - Coal shaken from train lands on the ground by the tracks which is then washed into the waterways
  - Coal shaken from trains directly falls into water as trains pass near or over waterway
- Courts Holding:
  - Discharges that first fall onto land but are then washed in via other means are not point source discharges
  - Aerial and windblown discharges from the train directly to the waterway are a basis for liability



## Cases of Note

# *Alaska Community Action on Toxics 2013*

- Discharges at issue:
  - Coal blown from coal piles directly to nearby waterway
  - Coal contaminated snow plowed from dock into nearby waterway
- Courts Holding:
  - Coal blown from stationary coal piles that land in nearby waterway do not originate from point source
  - Court suggests snow theory might be a basis for liability if sufficient evidence was provided

# Where does this leave us?

- ISGP is creating liability for incidental discharges
- Actual liability is murky
- Liability largely turns on point source determination
- Courts are skeptical of evidentiary basis for claims
- Monitoring is challenging for operators
  
- No clear route to permitting for operators

# Gray Area is Sub-Optimal

- Regulators, operators, and environmental groups benefit from clear guidelines
- Unfeasible for operators to prevent eliminate all discharges when handling bulk commodities
- The ISGP and corrective action framework do this well.
  - Provide clear benchmarks to operators (AKART)
  - Operators are required to monitor and improve their compliance over time
  - Regulators are involved in the process and have oversight of compliance
  - Requires operators to monitor and report data
  - Operators receive protection if complying with permit terms (permit shield)

# Thank You

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# Citations of Note

- *Puget Soundkeeper Alliance v. Louis Dreyfus Commodities LLC*, 192 F. Supp. 3d 1165, 1173-76 (W.D. Wash. 2016)
- *Sierra Club v. BNSF Railway Co.*, 2016 WL 6217108, at \*9 (W.D. Wash. Oct. 25, 2016)
- *Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, 940 F. Supp. 2d 1005 (D. Ak. 2013)
- *Okanogan Highlands Alliance v. Crown Resources Corp.*, 544 F. Supp. 3d 1092 (E.D. Wash. 2021) (holding permit terms separately enforceable)
- *Waste Action Project v. Port of Olympia*, 2019 WL 6215281 (W.D. Wash. Nov. 21, 2019) (rejecting collateral permit protection and de minimus defense)